

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF

MIDWEST FEEDING CO.

Respondent

Proceedings under
Section 309(a) and (g)
of the Clean Water Act,
33 U.S.C. § 1319(a) and (g)

COMPLAINT AND
CONSENT AGREEMENT/
FINAL ORDER

Docket No. CWA-07-2003-0194

COMPLAINT

Jurisdiction

1. This administrative action is being conducted pursuant to Section 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a) and (g), and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order serves as notice that the Environmental Protection Agency (EPA) has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. The Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA Region VII, is the Director of Region VII's Water, Wetlands, and Pesticides Division.

4. The Respondent is Midwest Feeding Company, which is incorporated in the state of Nebraska.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into waters of the United States, except when discharged in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6) to include biological materials and agricultural waste discharged to water.

8. Concentrated animal feeding operations, as defined by 40 C.F.R. § 122.23, are "point sources" pursuant to Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

9. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

10. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), provides that any person who violates Section 301 of the Clean Water Act shall be subject to administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which a violation continues, up to a maximum total penalty of \$125,000. Under the Civil Monetary Inflation Rule, 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$137,500, may be assessed for violations of Section 301 of the CWA, 33 U.S.C. §§ 1311, that occur after January 30, 1997.

Factual Background

11. Respondent purchased the Facility from Exidon, Inc. in 1995. At the time, the Facility had an effective NPDES permit that was issued to Exidon by NDEQ. In 1998, Respondent notified NDEQ that the existing NPDES permit for the Facility should be transferred to Respondent.

12. On June 14, 2001, Respondent's wastewater holding pond overflowed, resulting in the discharge of manure-laden wastewater from the Facility into the Big Blue River. The discharge continued for several days. The discharge was not the result of a precipitation event greater than the 25-year, 24-hour storm or a "chronic wet period."

13. Since at least August 2002, pollutants from the wastewater holding pond at the Facility have been continually leaking into groundwater and then discharged into the Big Blue River. The continual discharge of pollutants from the leaking wastewater storage structure at the Facility into the Big Blue River is not the result of a 25-year, 24-hour storm or chronic wet period.

14. From July 1998 until June 2001, Respondent did not have in place at the Facility permanent identification marks to indicate the liquid level at which the minimum storage and minimum design capacities are available.

15. Between June 2001 and April 2003, Respondent repeatedly failed to dewater the holding pond at the Facility on dewatering days during time periods when the required minimum storage capacity was not available in the holding pond at the Facility.

16. In 2001 and 2002, Respondent failed to dewater the holding pond at the Facility so as to make the Minimum Design Capacity available prior to the winter months.

17. Respondent did not orally report the June 14-15, 2001 discharge within twenty-four hours.

18. From July 1998 until April 2003, Respondent did not monitor and record on a daily basis the liquid level in the wastewater storage structure at the Facility.

Findings of Violation

19. The facts stated in paragraphs 11 through 18 above are herein incorporated.

20. Respondent's discharge of wastewater from the Facility to the Big Blue River in June 2001 was not authorized by Respondent's NPDES permit, and thus was a discharge of pollutants from a point source to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. §§1311.

21. Respondent's ongoing discharge of pollutants from the Facility to the Big Blue River due to leaks from the wastewater storage structure was not authorized by Respondent's Permit No. 0052418, and thus was a discharge of pollutants from a point source to waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

22. From July 1998 until June 2001, Respondent's operation of the Facility without permanent identification marks indicating the liquid level at which the minimum storage and minimum design capacities are available is a violation of NPDES Permit No. 0052418, Sections 301(a) and 402 of the CWA, and implementing regulations.

23. Between June 2001 and April 2003, Respondent's failure to make the Minimum Storage Capacity available by dewatering at the Facility on dewatering days is a violation of NPDES Permit No. 0052418, Sections 301(a) and 402 of the CWA, and implementing regulations.

24. In 2001 and 2002, Respondent's failed to dewater as needed to make the Minimum Design Capacity available before the winter months, which is a violation of NPDES Permit No. 0052418, Sections 301(a) and 402 of the CWA, and implementing regulations.

25. Respondent's failure to orally report the June 14-15, 2001 discharge is a violation of NPDES Permit No. 0052418, Sections 301(a) and 402 of the CWA, and implementing regulations.

26. From July 1998 until April 2003, the Respondent failed to monitor and record on a daily basis the liquid level of the wastewater retention structure which is a violation of NPDES Permit No. 0052418, Sections 301(a) and 402 of the CWA, and implementing regulations.

CONSENT AGREEMENT

27. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

28. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

29. Although not required by the Clean Water Act or any other federal, state, or local law, in settlement of this matter Respondent shall complete the following supplemental environmental project ("SEP"), which the parties agree is intended to secure significant environmental or public health protection and improvements. Respondent shall construct a new, properly lined holding pond at the Facility, with an approximate capacity of 166.7 acre-feet. The holding pond shall be located immediately south of the feedlot, in a location upgradient of the existing holding pond. Upon completion of construction of the new holding pond, the existing holding pond will be properly closed.

30. a. Within 30 days after receiving a fully-executed copy of this Complaint and Consent Agreement/Final Order, Respondent shall submit a request for a state permit modification and detailed design plans for the SEP to the Nebraska Department of Environmental Quality ("NDEQ") for review and approval.

b. Upon receipt by Respondent of any NDEQ comments on the permit modification request and design plans, Respondent shall modify the plans as necessary and resubmit the plans to NDEQ for review and approval. Respondent shall also respond to any NDEQ comments and/or requests for additional information or modifications to the SEP plans. Respondent shall respond to the comments of NDEQ within the time allowed by those agencies.

c. Upon NDEQ final approval of Respondent's design plans for the SEP ("Final Approval of the SEP"), Respondent shall proceed to construct the SEP in accordance with the NDEQ-approved plans, and in accordance with a construction schedule to be provided to Respondent by NDEQ when it approves the plans.

d. Within 60 days of completion of construction of the SEP, Respondent shall submit a SEP Completion Report to EPA and NDEQ. The SEP Completion Report shall contain the following information:

- (i) a detailed description of the SEP, as constructed, including as-built drawings of the completed project, certified by a registered professional engineer;
- (ii) itemized costs for the SEP, with documentation of all eligible SEP costs, including invoices, purchase orders, or other documentation that specifically identifies and itemizes the costs of the goods and/or services for which payment has been made; and
- (iii) certification by Respondent that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order.

e. Once Respondent has constructed the SEP, Respondent shall operate and maintain the project so that it continues to function as intended, and in accordance with and as required by all state and federal laws, regulations, and permits.

31. The total expenditure for the SEP shall not be less than \$80,000. Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP completion report.

32. Respondent shall copy EPA on all correspondence, reports, memoranda or other written communications ("Reports") that Respondent sends to NDEQ concerning the SEP.

33. Respondent is solely responsible for obtaining any approvals, authorizations, or permits that are needed for the SEP from any state or local government agency or entity. Respondent shall seek any such authorizations or approvals in a timely manner, and shall promptly provide any requested or required information or documentation to such agencies. Respondent shall copy EPA and NDEQ on all correspondence Respondent sends to any other government entities concerning the SEP.

34. Respondent shall submit all correspondence and Reports required by this Consent Agreement and Final Order to Paula Higbee, CAFO Enforcement Coordinator, EPA Region VII, 901 North 5th Street, Kansas City, Kansas 66101.

35 . a. After receipt of the SEP Completion Report described in paragraph 30.d above, EPA will notify the Respondent, in writing, regarding: (i) any deficiencies in the SEP Report itself along with a grant of an additional sixty (60) days for Respondent to correct any deficiencies; or (ii) indicate that EPA concludes that the project has been completed satisfactorily or (iii) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with paragraph 36 herein.

b. If EPA elects to exercise option (i) above, i.e., if the SEP Report is determined to be deficient but EPA has not yet made a final determination about the adequacy of SEP completion itself, EPA shall permit Respondent the opportunity to object in writing to the notification of deficiency given pursuant to this paragraph within ten (10) days from the receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement on changes necessary to the SEP Report. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision on adequacy of the completion of the SEP to Respondent, which decision shall be final. In the event the SEP is not complete as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph 36 herein.

36. a. In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in paragraphs 29 and 30 above and/or to the extent that Respondent's actual expenditures for the SEP do not equal or exceed the cost of the SEP described in paragraph 30 above, Respondent shall be liable for stipulated penalties in the amount of \$11,250.

b. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 1 of the Final Order which accompanies this Consent Agreement. Interest and late charges shall be paid as stated in paragraph 2 of the Final Order which accompanies this Consent Agreement.

c. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or for Respondent's violation of any applicable provision of law regarding matters that have not been specifically alleged in the Complaint.

37. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the Clean Water Act."

38. This Consent Agreement and Final Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the SEP undertaken pursuant to this Agreement.

39. a. If any event occurs which causes or may cause delays in the completion of the SEP as required under this Agreement, Respondent shall notify Complainant in writing not more than ten (10) days after the delay or Respondent's knowledge of the anticipated delay, whichever is earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the delay, and the timetable by which those measures will be implemented. The Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of the Respondent's right to request an extension of its obligation under this Agreement based on such incident.

b. If the parties agree that the delay or anticipated delay in compliance with this Agreement has been or will be caused by circumstances entirely beyond the control of Respondent, the time for performance hereunder shall be extended by Complainant, after consultation with Respondent, for a period that is reasonably necessary under the circumstances.

c. In the event that the EPA does not agree that a delay in achieving compliance with the requirements of this Complaint and Consent Agreement/Final Order has been or will be caused by circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of its decision and any delays in the completion of the SEP shall not be excused.

d. The burden of proving that any delay is caused by circumstances entirely beyond the control of the Respondent shall rest with the Respondent. Increased costs or expenses associated with the implementation of actions called for by this Agreement shall not, in any event, be a basis for changes in this Agreement or extensions of time under section (b) of this paragraph.

40. Solely for the purpose of settling this matter and thereby avoiding the expense and uncertainties involved in a formal adjudication, Respondent consents to the issuance of the Final Order hereinafter recited, consents to the payment of the civil penalty as set forth in the Final

Order, and consents to the performance of the Supplemental Environmental Project.

41. The penalty payment made by Respondent pursuant to this Complaint and Consent Agreement/Final Order is payment of a civil penalty and shall not be deductible for purposes of federal taxes.

42. Each signatory to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Complaint and Consent Agreement/Final Order.

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Without admitting or denying the factual allegations set forth in the Complaint, Respondent shall pay a total administrative civil penalty of \$13,750 Dollars within thirty (30) days of the effective date of the Final Order. Payment shall be by cashier's or certified check, made payable to "Treasurer, United States of America," and referencing EPA Docket No. CWA-07-2003-0276, and remitted to:

EPA - Region VII
Attn.: Regional Hearing Clerk
c/o Mellon Bank
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

A copy of the check shall be mailed to:

David Cozad
Associate Regional Counsel
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

2. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest thereon.

3. Respondent shall undertake and complete the environmentally beneficial project set forth in paragraphs 29 and 30 of this Consent Agreement.

4. In the event that Respondent fails to timely implement and complete the project set forth in paragraphs 29 and 30, Respondent shall pay stipulated penalties as set forth in paragraph 36 of this Consent Agreement.

5. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

6. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

7. With respect to matters not addressed in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.


8. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

9. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date

9/18/03


Leo J. Alderman
Director

Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency
Region VII

Date


9/16/03


David Cozad

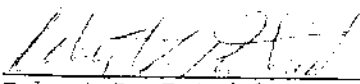
Associate Regional Counsel
U.S. Environmental Protection Agency
Region VII

RESPONDENT:
MIDWEST FEEDING COMPANY

9/9/03
Date


Name:
Title: *President, Midwest Feeding Co*

IT IS SO ORDERED. This Order shall become effective immediately.


Robert L. Patrick
Regional Judicial Officer

Date: November 7, 2003

CERTIFICATE OF SERVICE

I certify that on the date below I hand delivered the original and one true copy of this Complaint and Consent Agreement/Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101. I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint and Consent Agreement/Final Order to the following:

David Dickinson
Midwest Feeding Company
Rt 1, Box 8
Milford, NE 68405

Dated this 7th day of November, 2002.

Deby White
Name